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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 576

GENERAL AMERICAN TRANSPORTATION CORPORATION,

Petitioner,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY AND BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GENERAL AMERICAN TRANSPORTATION CORPORATION, *petitioner,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

OPINIONS BELOW.

The memorandum of the District Court is printed in the Record at page 231; its findings of fact and conclusions of law are printed at pages 252-275.

The opinion of the Court of Appeals (R. 291-306) is reported at 191 F. 2d 865.

JURISDICTION.

The judgment of the Court of Appeals was entered October 17, 1951. (R. 307.) Petition for rehearing was duly filed November 1, 1951, and denied November 14, 1951. (R. 308.)

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether "transportation" under the Interstate Commerce Act continues until the property transported has been delivered by the interstate carriers—or whether such transportation may "come to an end" at some indeterminate point before delivery.

2. Whether the liability of an initial carrier for loss of property, which has been shipped in interstate commerce and damaged before delivery, is governed by the original contract of transportation (*i. e.*, the initial carrier's through bill of lading and the applicable tariffs)—or whether such liability may be the subject of an independent "local arrangement" with the terminal connecting carrier.

3. Whether property, shipped in interstate commerce under a uniform domestic bill of lading and destined for export, is subject to common carrier liability under the original contract of transportation when the property is lost or damaged in the possession of the terminal connecting carrier, after such carrier has accepted orders to deliver the

property to a ship but before carriage to shipside has been completed—or whether the obligation of carriage thus assumed is a mere "terminal switching operation" which may be performed without regard to the terms of the through contract.[1]

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1. Reversal of the Court of Appeals on the foregoing questions would establish respondents' liability for 45 of the 66 carloads in controversy. These 45 carloads are those which were damaged after the terminal carrier had accepted orders to carry them to shipside but before such carriage had been completed, and with respect to which the contracts of interstate transportation, if in effect at the time of the disaster, clearly imposed full carrier liability upon the respondents. The issue thus posed by this petition is simply whether the contracts of interstate transportation were still in effect when the disaster occurred.

In order to avoid complicating this basic issue with questions of contract interpretation, petitioner will defer its argument that respondents' liability for the remaining 21 carloads was that of carrier rather than that of warehouseman. However, in the event that the writ is granted, petitioner will request this Court to consider the following additional questions:

Whether property shipped in interstate commerce may be said to have been "tendered for delivery" within the meaning of the uniform bill of lading before the carriers have completed their current obligations of carriage. (Apparent conflict with *Keystone Motor Freight Lines* v. *Brannon-Signaigo Cigar Co.*, 5 Cir., 115 F. 2d 736, 738.)

Whether even a tender of delivery terminates carrier liability under a uniform bill of lading before the expiration of free time following service of a proper notice of arrival. (Compare *Michigan Central R. Co.* v. *Mark Owen & Co.*, 256 U. S. 427.)

Whether the words "arrival at the destination or at the port of export" mean arrival anywhere within the geographical limits of a port and, if not, whether a notice of arrival served before property has been placed either at the delivery point or at the prearranged or customary hold point can start the running of "free time" and terminate carrier liability. (Direct conflict with *Pillsbury Flour Mills* v. *Erie R. Co.*, 127 Misc. 466, aff'd 220 App. Div. 826, aff'd 248 N. Y. 649, cert. den. 278 U. S. 645; and *Hoyland Flour Mills Co.* v. *Missouri Pacific R. Co.*, 222 Mo. App. 599, cert. den. 277 U. S. 586.)

Whether a transit tariff which authorizes the unloading and temporary retention of export goods, but which fails to provide for the reduction of carrier liability during the transit period, nevertheless confers immediate warehouseman's status upon the carrier when export goods shipped under uniform bills of lading are unloaded by the carrier onto its own premises.

STATUTE INVOLVED.

The statute involved is the Interstate Commerce Act, 49 U. S. C., sec. 1, *et seq.*, particularly sec. 1(2), limiting the scope of the Act to "transportation," sec. 1(3), defining "transportation," and sec. 20(11), the Carmack Amendment.

STATEMENT.

Nature of the case: These actions were brought under the Carmack Amendment by petitioner, as shipper, against respondents, as initial rail carriers, for damage to 66 carloads of French box car parts which had been carried by rail from Indiana to Texas for export to France and which had been destroyed in the Texas City disaster of April 16, 1947, on the premises of the terminal rail carrier. Judgments in favor of petitioner (R. 275) were reversed by the Court of Appeals. (R. 307.)

Summary of facts: The carloads had been shipped from Indiana in March, 1947, under uniform domestic bills of lading marked "for export",[2] and under export tariffs calling for shipside delivery. (R. 7-9, 33, 140-166.)[3] Before

2. The cars had originally been destined to be exported from Galveston under the storage-in-transit arrangements authorized by Tariff 1033 M (R. 7-9, 71-3), but were thereafter diverted to Texas City for export under identical arrangements. (R. 25, 35-37, 79-80.) The diversion was authorized by tariff (R. 14, 18, 141) and it is stipulated that the terminal carrier at Texas City was one of the "common carriers transporting said cars from origin to destination." (R. 27.)

3. Freight on each carload was prepaid at East Chicago at rates prescribed in Export Freight Tariff 1016-I for transportation

any of the cars had arrived at Texas City, the terminal rail carrier at this port, as authorized by the applicable export transit tariff, had arranged to unload the carloads at a designated storage place on its premises, to hold them until the consignee should order delivery to an ocean vessel, and then, upon receipt of such order, to reload the carloads into its own cars and carry them to its shipside track. (R. 71-74, 79-81.) Accordingly, upon receiving the carloads on April 2, the terminal carrier began putting these arrangements into effect. By April 14, it had unloaded at the storage place 64 of the 66 carloads. (R. 26, 30-31.) It had not unloaded the other two cars, however, but had continued to hold them under load on nearby tracks. (R. 31, 66.)

On the afternoon of April 14, the consignee ordered the terminal carrier to deliver to an ocean vessel (which had docked about half a mile away) 44 of the 64 unloaded carloads and the two cars which had not yet been unloaded. (R. 27, 40-42, 82, 201.) The terminal carrier promptly

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from East Chicago, Indiana, to Texas City, Texas, for export to Europe. (R. 24.) This tariff was applicable only to export traffic transported from the port of export by "ocean steamship service to foreign countries"; it applied specifically to "traffic which does not leave the possession of the inland carriers until delivered to the ocean carriers or their agents" and obligated the rail lines to "place export freight for receipt by ocean ships or vessels" either on docks or "in or on tracks placed on docks, wharves or piers" (R. 145-6). Tariff 1016-I incorporated by reference Transit Tariff 1033-M (R. 141) which authorized car parts exported from Texas City to be temporarily unloaded on the terminal carrier's premises, but only if the property were thereafter "placed on board ship at such port for actual exportation within twelve months after arrival at the port." (R. 151-2.)

Even aside from the tariffs, it would not have been physically possible for export delivery to have been made at any place other than the terminal carrier's shipside pier; neither the consignee nor the steamship company owned, leased or in any way controlled any premises at Texas City at which the property could have been received or from which it could have been exported; the only port facilities at which delivery could have been effected were owned by the terminal carrier. (R. 89, 179, 206.)

commenced compliance with this order. By April 16, it had reloaded eleven of the carloads from the storage place into its own cars for carriage to shipside, and had moved to its shipside track one of the two cars which had not been unloaded. (R. 26-31, 222-226, 230.)

On the morning of April 16, before any of the carloads had been delivered to the ship, they were damaged or destroyed by fire and explosion on the premises of the terminal carrier. (R. 27-28, 195-6.)

How the case was decided below: Under a stipulation whereby respondents assumed the liability of the terminal carrier at Texas City arising "under contracts of transportation originating at East Chicago, Indiana" but not its liability arising "under local contracts of transportation, if any, originating at Texas City, Texas," (R. 28, 45-6),[4] the District Court entered judgments in favor of petitioner on all 66 carloads. (R. 275.)

The Court of Appeals reversed and remanded the cause with directions to enter judgments in favor of respondents. (R. 306-7.) The court held that "the interstate transportation had come to an end" before April 14; that the delivery order issued on that date was therefore "only a local arrangement" between the consignee and the terminal carrier; and that the carriage of the carloads to the shipside delivery point was a mere "terminal switching operation" which could be performed after "the responsibility of the carriers for further movement under the original contract of transportation had ceased." (R. 303, 306.)

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4. The stipulation does little more than to confirm the applicability of the Carmack Amendment to these export shipments. It was deemed necessary because the case was tried in the District Court before the decision of this Court in *Reider* v. *Thompson*, 339 U. S. 113.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In reversing the judgments of the District Court.

2. In holding that interstate transportation had come to an end before delivery at shipside.

3. In holding that the carriage of the property from the transit point to the delivery point and its delivery at shipside were the subject of local arrangement and not part of the transportation governed by the contracts made under the Interstate Commerce Act.

4. In relieving respondents of the carrier liability imposed by the bills of lading for loss of property which the terminal carrier was under a present duty, at the time of the loss, to carry to shipside.[5]

5. These specifications embody only the primary questions which petitioner believes to justify the allowance of the writ and the claims of error which, if sustained, would establish liability on the 44 unloaded carloads covered by the order to reload and deliver, and the car still under load which had been ordered to shipside but not placed there.

If the writ is granted, petitioner will specify additional errors affecting the car which had been placed at shipside but not delivered, and the 20 unloaded carloads not covered by the order of April 14. In such event, petitioner will urge that the court below erred in holding that either of the two cars under load had been "tendered for delivery" before placement at shipside, in holding that the notices served from the classification yard were proper "notices of arrival" under the bills of lading and tariffs, and in relieving the carriers of all liability on the 20 cars awaiting delivery orders.

REASONS FOR GRANTING THE WRIT.

Because the Court of Appeals has drastically curtailed the concept of "transportation" which determines the entire scope of the Interstate Commerce Act, the decision below strikes at the very foundation of federal control of interstate carriers. The uncertainty and confusion thus introduced into this important federal field can be dispelled only by action of this Court. It is submitted that certiorari should be granted:

1. *To resolve a conflict in basic principle between the decision below and the uniform decisions of this Court.* This Court has consistently adhered to the rule that interstate transportation and the contracts governing it continue until delivery. *E.g., Southern R. Co.* v. *Prescott,* 240 U.S. 632; *Michigan Central R. Co.* v. *Mark Owen & Co.,* 256 U.S. 427. The Court of Appeals has flatly rejected this rule, holding instead that interstate transportation may end before delivery and before the goods have been carried to the delivery point.

2. *To preserve the Interstate Commerce Act from a construction which would imperil its objectives.* The extent of federal carrier regulation is limited under the act to "transportation"; 49 U.S.C., sec. 1 (2). If "transportation" should be curtailed to exclude services performed before delivery, as the court below suggests, then federal control would be similarly curtailed and would thus be rendered ineffective to prevent the overcharges and discriminations which first called the act into being. *Cleveland C. C. and St. L. R. Co.* v. *Dettlebach,* 239 U.S. 588, 594; *Georgia F. & A.R. Co.,* v. *Blish Milling Co.,* 241 U.S. 190, 197.

3. *To re-establish certainty in the administration of federal carrier law.* The decision below rejects the established rule that interstate transportation continues until delivery, but fails to suggest any definite, ascertainable or reasonable criteria for determining at what point interstate transportation ends and local transportation begins. A concept which is now clear would be thrown into confusion.

4. *To resolve a direct conflict between the decision below and the decision of the Court of Appeals for the Second Circuit in Lehigh Valley R. Co.* v. *John Lysaght, Ltd.,* 271 F. 906, *cert. den.* 256 U.S. 704. The decision of the Seventh Circuit denying recovery on the carloads damaged while under orders to be carried to shipside, cannot be reconciled with the decision rendered by the Second Circuit which allowed recovery on cars identically situated.

5. *To prevent the establishment of an erroneous precedent of far-reaching effect.* The errors of the Court of Appeals are too fundamental for their impact to be confined to the instant case, or even to the various carrier cases now pending in consequence of the Texas City disaster.[6] If permitted to stand, the decision could well have a direct effect upon almost every interstate rail movement which involves carrier services performed after property has approached, but not reached, the place of ultimate delivery.

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6. The volume of carrier litigation arising from the Texas City disaster is by no means insignificant. The explosions destroyed practically all of the property on the premises of the terminal carrier at Texas City (R. 195-7). Much of this property, like the car parts here involved, had been shipped in interstate commerce and had been damaged while awaiting transfer to an ocean vessel: *e. g.*, cases 49 C 550—49 C 554, inclusive, 49 C 968 and 49 C 969, U. S. Dist. Ct., N. D. Ill., E. D.

ARGUMENT.

1.

The decision below conflicts with the basic principles laid down by the uniform decisions of this Court.

The Interstate Commerce Act defines "transportation" as including "all services in connection with the receipt, *delivery* • • • storage and handling of the property transported". 49 U.S.C., sec. 1 (3). The Carmack Amendment to the Act obliges each initial carrier "receiving property for *transportation* from a point in one state • • • to a point in another state" to issue a through bill of lading and to assume liability for all recoverable loss or damage during the interstate transportation while the property is in the possession of any connecting or terminal carrier, 49 U.S.C., sec. 20 (11).

This Court has consistently construed the act as broadly as its language requires and, in consequence, the following principles have become axioms of federal carrier law:

(1) The initial carrier's through bill of lading, which incorporates the applicable provisions of published tariffs, constitutes the entire contract of interstate transportation (*Southern R. Co.* v. *Prescott,* 240 U.S. 632; *Cleveland C.C. & St. L. R. Co.* v. *Dettlebach,* 239 U.S. 588; *Galveston Wharf Co.* v. *Galveston H. & S.A. R. Co.,* 285 U.S. 127).

(2) The interstate contract remains in force as long as the interstate transportation continues, and since "transportation" is defined to include delivery, neither the transportation nor the contract governing it may end before the property has been delivered. Nothing short of actual delivery will suffice; placement for

delivery does not terminate the contract (*Michigan Central R. Co.* v. *Mark Owen & Co.*, 256 U.S. 427) nor does tender of delivery (*Southern R. Co.*, v. *Prescott*, 240 U.S. 632) nor does unloading into storage (*Western Transit Co.* v. *A. C. Leslie & Co.*, 242 U.S. 488).

(3) The original through contract fixes the liability of all participating carriers for loss or damage to undelivered goods, and this liability cannot be altered by "local arrangements" with the consignee (*Southern R. Co.* v. *Prescott*, 240 U.S. 632; *Georgia F. & A.R. Co.* v. *Blish Milling Co.*, 241 U.S. 190).

Each of these principles is directly challenged by the decision below. All the carloads in the case at bar had been shipped in interstate commerce under through bills of lading; all were destined for shipside delivery; all were damaged before delivery while still in the hands of the terminal rail carrier. Without questioning these facts, which are undisputed, the Court of Appeals nevertheless holds that, even before a single one of these undelivered carloads had been placed within half a mile of the shipside delivery point, "the responsibility of the carriers for further movement under the original contracts of transportation had ceased" (R. 303) and "the interstate transportation had come to an end." (R. 306.) Accordingly, the court below has relieved respondents of their stipulated liability "under contracts of transportation arising at East Chicago, Indiana" (R. 45-6) upon the ground that the carriage of these export carloads to shipside for final delivery was "only a local arrangement between the consignee and the Terminal Railway Company" (R. 306).

These holdings are in conflict with every case decided by this Court, including the very cases cited in the opinion below. The conflict is nonetheless inescapable for being unadmitted and perhaps unrecognized by the Court of Ap-

peals. Indeed, the opinion presents the rather curious picture of Supreme Court cases being cited for propositions which reject their rationale and which contradict or ignore the principles for which they stand.[7]

2.

The decision below imperils the objectives of the Interstate Commerce Act.

The word "transportation" measures the entire coverage of the Interstate Commerce Act. The provisions of the act apply only to "transportation" as therein defined. 49 U.S.C., sec. 1 (2). By the Hepburn Act (34 Stat. 584), the definition of transportation has been broadened to include delivery and all other services incident to an interstate shipment. 49 U.S.C., sec. 1 (3). This inclusive definition has been cited by this Court as evidence that Congress intended to bring all such services within the regulatory provisions

7. For example, the court below says of *Southern R. Co.* v. *Prescott*, 240 U. S. 632, that "it was conceded that the contract of carriage was ended" (R. 299). Actually, the quoted words are taken from the South Carolina decision (99 S. C. 422, 424) which this Court reversed; indeed, this was the precise point on which the reversal turned. This Court could not have acknowledged the existence of a "contract of carriage," as distinguished from a contract of "transportation," without also admitting that the goods were retained under a "local contract" of bailment governed by state law. The holding of the *Prescott* case that federal law governed, far from being a mere matter of arbitrary preference, was simply the logical result of applying the principles which the court below rejects; in other words, even though (unlike the case at bar) the carriage had been completed and the goods tendered for delivery, they were still undelivered, therefore still in the course of interstate transportation, therefore governed by the contracts made under the Carmack Amendment, therefore subject to federal law.

Similarly, *Michigan Central R. Co.* v. *Mark Owen & Co.*, 256 U. S. 427, is cited without mention of its basic issue (R. 299). The carrier in that case had sought to escape the liability imposed by the bill of lading by claiming that the federal contract had been terminated by a mere placement for delivery; the defense was rejected because delivery had not actually been completed.

of the act "in order to prevent overcharges and discrimination from being made under the pretext of performing such additional services." *Cleveland C.C. & St. L. R. Co.*, v. *Dettlebach*, 239 U.S. 588, 594.

The Court of Appeals, in defiance of the statutory definition, would reduce the concept of transportation to what may loosely be described as line haul carriage. It would thus remove from federal regulation every service performed by an interstate carrier after the goods had arrived at some undefined point within the general area of destination. This would permit the carrier to make discriminatory "local arrangements" which federal control, limited to the first portion of the interstate movement, would be powerless to prevent. The net effect of the decision below would be to

> "antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed." *Georgia F. & A.R. Co.* v. *Blish Milling Co.*, 241 U.S. 190, 197.

3.

The decision below would inject confusion and uncertainty into the operation of the Interstate Commerce Act.

Under existing decisions, the standard for determining the duration of interstate transportation is definite and clear: interstate transportation continues until the goods have been delivered. For this workable and readily ascertainable rule, the Court of Appeals would substitute such criteria as the comparative geographical proximity to the delivery point, the extent of the terminal carrier's premises and the allocation of delivery charges between shipper, consignee and carrier. (R. 306.) One may wonder whether the decision would have been the same if the ship had been farther away, or if the pier had been owned by a third person,

or if (as was actually the fact in the case of two of the carloads[8]) all the expenses of moving all the cars to shipside had been included in the prepaid freight? These factors seem to be not only irrelevant and incidental, but incapable of precise ascertainment; they would reduce "transportation" to a shadowy concept, gradually petering out as the end of the journey is approached, and finally ceasing to exist at a point which could only be the subject of speculation and conjecture.

4.

The decision below is in direct conflict with the decision of the Court of Appeals for the Second Circuit in Lehigh Valley R. Co. v. John Lysaght, Ltd., 271 F. 906, cert. den. 256 U. S. 704.

With respect to at least 45 of the carloads in controversy, the rejection of the principles laid down in *Southern R. Co.* v. *Prescott,* 240 U. S. 632 and other cases cited, has brought the court below into direct conflict with the court of appeals for another circuit. These 45 carloads involve no question of contract interpretation; even if they had been held subject to warehouseman's liability prior to April 14, the bills of lading clearly imposed full common law liability for damage incurred after the terminal carrier had accepted orders to carry them to shipside and before such carriage had been completed. (R. 7-9, 33.) There is no

8. Under the original rate tariff, the prepaid freight covered the entire cost of shipside delivery of all cars which were not unloaded in transit. (R. 145-6.) Thus the cost of moving to shipside the cars which the terminal carrier failed to unload had been paid, not by the consignee under a "local arrangement," but by the shipper in advance. As for the charges for reloading and moving the unloaded cars, these were imposed under a transit tariff which was expressly made applicable by the original rate tariff (R. 141, 151), and even as to these cars the prepaid freight covered the final charge of wharfage which could not accrue until actual delivery at the pier. (R. 146, 151, 219.)

provision either in the uniform bill of lading or in any applicable tariff (and none is cited by the court below) which would permit the terminal carrier to perform this obligation of carriage as a warehouseman.

It is thus apparent that if the contracts of transportation were still in force when the 45 carloads were damaged, the terminal carrier would be liable for this loss under the bills of lading, and the respondents, as initial carriers, would bear the same liability under the Carmack Amendment and the express stipulation of the parties. This proposition does not appear to be challenged by the court below; indeed, it is clear that the court's decision to relieve respondents of liability was based upon its assumption that the contracts had terminated before the damage occurred. (R. 303, 306.)

The Court of Appeals for the Second Circuit reached precisely the opposite conclusion on carloads identically situated. In *Lehigh Valley R. Co.* v. *John Lysaght, Ltd.*, 271 F. 906, cert. den. 256 U. S. 704, property consigned to New York for export had arrived at the Black Tom Terminal at Jersey City, one of the terminal points in New York Harbor,[9] and were there held awaiting lighterage delivery orders. By a provision of the bill of lading which reduced carrier liability following a specified period after notice of arrival "at destination or at port of export" and by a tariff provision, the liability of the carrier during the holding period had been reduced to that of warehouseman. On the afternoon of Saturday, July 29, 1916, the carrier received orders from the consignee to deliver the goods by

9. The terminal is expressly so described in the carrier's tariff in the *Lysaght* case: par. 8 of tariff, 271 F., 907. It is well settled that the rail yards and terminals in Jersey City were and are within the territorial limits of New York Harbor or the port of New York: *Pillsbury Flour Mills* v. *Erie R. Co.*, 127 Misc. 466, aff'd 248 N. Y. 649, cert. den. 278 U. S. 645; *Hoyland Flour Mills* v. *Missouri Pac. R. Co.*, 222 Mo. App. 599, cert. den. 277 U. S. 586.

lighter to an ocean vessel at a pier in New York Harbor, delivery to be made the following Wednesday. Within a matter of hours after the orders were received and before the carrier had moved the shipment, it was destroyed in the Black Tom explosion.

The Second Circuit affirmed a directed verdict against the carrier upon the ground that carrier liability had been reinstated as soon as the orders for lighterage delivery were received. It held that the transportation from hold point to shipside (which, as in the case at bar, was a movement wholly within the territorial limits of the port of export) was not a mere "terminal service" which could be performed by the railroad as a warehouseman, but a part of the rail-carrier's service of carriage which was subject to full carrier liability under "the Interstate Commerce Act and the uniform bill of lading." (271 F. 909.)

The conflict between the circuits is undeniable. There is not a fact in the record of either case to justify a holding that transportation had "come to an end" in one case and not in the other. The opposing decisions can only be explained by the fact that the Second Circuit has followed the rule that the contract of transportation continues until delivery; the Seventh Circuit has not.

Nevertheless, the Seventh Circuit refuses to admit the conflict. It says that the *Lysaght* shipment "could not be said to have reached its destination." (R. 306.) But this merely begs the question. If "destination" means the point of delivery, then neither shipment had reached destination. On the other hand, if "destination" means any intermediate transit point which happens to be within the territorial limits of a port, then the *Lysaght* cars were no more in the course of transportation than were the cars at Texas City. It is only by bringing in such immaterial factors as the size of the port and the dis-

tance of the uncompleted carriage that any distinction could be possible. Yet it is apparent that the *Lysaght* case would not have been decided differently if New York Harbor had been smaller, or if the pier had been only half a mile from Black Tom, or if the ship had tied up on the Jersey side of the river and the shipside movement had been by rail instead of by lighter.

Even less valid as a "distinction" is the *Lysaght* tariff provision which the court below erroneously describes as having "fixed the exact time for carrier liability to be reinstated." (R. 305.) In fact, the *Lysaght* tariff said nothing whatever about carrier liability; it merely suspended the carrier liability imposed by the bill of lading and permitted warehouseman's status to be enjoyed only while goods were held awaiting delivery orders. It follows that the absence of a similar provision from the Texas City tariffs makes the case at bar a stronger case than *Lysaght* for the imposition of carrier liability.

The only tariff question which concerned the Second Circuit arose from the fact that the delivery order in the *Lysaght* case "told the railway company to do something *in futuro.*" (Dissenting opinion, 271 F. 911.) Neither Judge Hand (who as district judge passed on a point of pleading) nor Judge Hough (who dissented in the Circuit Court of Appeals) expressed any doubt that the interstate transportation continued or that carrier liability would be reinstated under the bills of lading when the carriers came under a present duty to deliver to shipside. However, Judge Hand in the District Court and Judge Hough in the Court of Appeals thought that this duty was postponed under the tariff until the carrier "could have commenced delivery" or until delivery "ought to have been in progress."

(271 F. 909, 911.) The majority of the Second Circuit disagreed, holding that carrier responsibility re-attached immediately upon receipt of the order.[10]

The elements which divided the judges of the Second Circuit are not present in the case at bar. Not only was there no tariff provision which could possibly be construed to extend warehouseman's liability beyond the receipt of the delivery order, but the order itself was a present order, immediately accepted and immediately acted upon. That the carrier "could have commenced delivery" to shipside is evidenced by the fact that *it did commence such delivery.* Delivery not only "ought to have been in progress"; *it was in progress.* In response to the delivery order the terminal rail carrier had reloaded eleven cars for delivery to the ocean vessel and had moved another to shipside before the loss occurred. If these facts had been present in the *Lysaght* case, there is no doubt that the decision against the carrier would have been unanimous.

10. An analysis of the *Lysaght* opinion makes it clear that the second circuit was announcing a rule of law and not merely interpreting a tariff in reverse. To be sure (to borrow from the court's opinion) "happier words might have been used" to describe the time when the transit tariff ceased to operate than to say of the time when carrier liability was reinstated that "this is expressly stated by A-1 of the company's tariff." (271 F., at 909-910.) However, these words do not appear to have misled any court but the court below, since the *Lysaght* case has been cited without reference to the tariff for the proposition that acceptance of forwarding orders immediately terminates warhouseman's status and reinstates carrier liability; *e. g., American Railway Express Co.* v. *Barnhart Drug Co.,* Tex. Civ. App., 22 S. W. 2d 759.

5.

The decision below, if permitted to stand, would be a dangerous precedent of far-reaching effect.

The court below has not merely committed error; it has challenged the basic assumptions of federal carrier law. To permit its decision to stand would not only leave unresolved a direct conflict between circuits, but would create a precedent for the reversal of a Congressional policy which has been consistently honored by this Court since 1906, when the Hepburn Act and the Carmack Amendment first became law.

Conclusion.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 576

GENERAL AMERICAN TRANSPORTATION CORPORATION,
Petitioner,

VS.

INDIANA HARBOR BELT RAILROAD COMPANY AND BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
Respondents.

RESPONDENTS' REPLY TO PETITIONER'S PETITION FOR CERTIORARI.

Indiana Harbor Belt Railroad Company and Baltimore and Ohio Chicago Terminal Railroad Company,
Respondents.

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Respondents.

RESPONDENTS' REPLY TO PETITIONER'S PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner has made no attack upon the findings of fact made in the opinion of the Court of Appeals, and, insofar as its petition for a writ of certiorari at this time is concerned, respondents rely upon and adopt the facts as stated by the Court of Appeals.

However, respondents respectfully desire, in addition, to challenge some of the statements of fact contained in the petition herein. Petitioner, on page 4, states that the carloads had been shipped "under export tariffs calling for shipside delivery". This is incorrect. The tariff referred to (Item 350-K of Tariff 1016-I) provided that "rates in this tariff apply to shipside" (R. 294, 146), and "where such

rates apply to shipside" and "under rates applying to shipside" export freight will be "placed on tracks on docks, wharves or piers" (R. 146). This is the only basis for petitioner's contention of shipside delivery. This was the original tariff; and, as shown by the opinion of the Court of Appeals, when, at the request of the consignee, the carloads were unloaded into storage, the rate then became not to shipside but became a rate "applicable from point of origin to the place of storage", (R 295, 151); and all subsequent storage charges, reloading charges, and switching charges were to be paid by the consignee, (R. 303, 80, 84); and, as stated by the Court of Appeals, "switching to the storage place and unloading there used up all of the transportation charges which had been prepaid", (R. 303).

On page 5 of the petition, it is stated that the terminal rail carrier had arranged to unload the carloads at a designated storage place on its premises, leaving the inference that this was done entirely upon the volition of the terminal company. This is incorrect in that, as shown by the opinion of the Court of Appeals, prior to the arrival of the shipments at Texas City, arrangements had been made by a representative of the consignee with the Texas City Terminal Railway Company that when the cars arrived in Texas City, they would be unloaded into storage on the premises of the Texas City Terminal (R. 103, 133); that the particular place of storage was agreed to by the Terminal and a representative of the consignee (R. 105); and that the charge for storage was to be paid to the Terminal Company by the consignee (R. 103, 133 and 296-297).

Further, in Footnote 3 on page 4 of the application, it is stated that the part of Export Freight Tariff 1916-I, which applied specifically here was that applicable to "traffic which does not leave the possession of the inland carriers until delivered to the ocean carriers or their agents". This is incorrect in that the undisputed evidence shows that the

part of the tariff which was applicable here is that part reading "on traffic which leaves possession of the inland carrier at an intermediate point or after arrival at the port of exit when application of the export rates are under such circumstances as authorized in a tariff on file with the Interstate Commerce Commission", (R. 215.)[1]

We again respectfully say that we rely primarily upon the statement of facts contained in the opinion

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NOTE 1

On page 9 of the petition, petitioner goes outside the record in this case, and states that a number of carrier cases are now pending involving the Texas City disaster. It is true that the insurance company subrogees prosecuting this present suit in behalf of petitioner, General American Transportation Corporation, have several other pending suits as subrogees. It is equally true that on the claims by other owners and subrogees (other than the companies involved in this case) it has been recognized and used as a basis of settlement that no carrier liability existed after either the expiration of free time or after unloading into storage. This was generally understood to be the rule by those handling this shipment for petitioner, by the rail carriers, and by other shippers and consignees. The general agent for both petitioner here and the consignee, J. D. Latta (the person in charge of this shipment for both of them, testified by deposition as a witness for petitioner that an inspection was made of the cargo immediately after it was unloaded into storage "to establish the railroad's responsibility" for damage to the freight (R. 136) and that he looked to the rail roads to make repair if the cargo was damaged prior to unloading into storage (R. 137) and to the terminal warehouse for damage to the cargo after unloading (R. 136). This was in substance

of the Court of Appeals which statement stands unchallenged in this Court.

Petitioner's statement of the Questions Presented begs the question in that it is assumed that no termination of the shipping contract (i. e. delivery) had occurred and free time had not expired.

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confirmed by the testimony of various witnesses that upon unloading the consignee's agent executed a delivery receipt. Mr. Sandberg, President of Texas City Terminal Railway Company, stated on unloading consignee executed a delivery receipt (R. 204-05). The other railroad employes confirmed this, (Huguet R. 173-174; Haughton, R. 186; Hester, R. 190-191; and White R. 192). Since all of the Terminal records were destroyed by the explosion (R. 173), none of these receipts could be produced and introduced in evidence. Mr. Walter, the tariff expert likewise testified that unloading into storage completed the bill of lading contract and constituted delivery (R. 216).

In addition the decision of the Court of Appeals is supported by all of the Interstate Commerce Commission rulings in point as shown by the following reported decisions of that Commission:

American Mfg. Co. v. Director General, 77 ICC Rep. 52 (1922)

Rolph, Mills & Co. v. Director General, 74 ICC Rep. 751 (1922)

A. Geisel Mfg. Co. v. Baltimore & O. RR. Co., 59 ICC Rep. 193 (1920)

The Court of Appeals decision, in addition to being correct as a matter of law, is a logical, fair, and common-sense conclusion and is in accord with industry opinion and practice and with the decisions of the Interstate Commerce Commission.

ARGUMENT.

I.

The Court of Appeals correctly held that since all of the cargo arrived on the premises on April 2, 1947 (14 days before the explosion), and since tender of delivery had been made, and valid notices of arrival had been sent and received by consignee, all on or before April 4, 1947 (12 days before the explosion), then upon the expiration of the four days free time provided in the appropriate tariffs, liability as a common carrier terminated.

The Court of Appeals held, as to the cars involved in this application, that there was a tender of delivery when the cars arrived on the Terminal property and that the notices of arrival were properly given and received by consignee, and further held that, after the expiration of the free time of four days, independent of the question of unloading, carrier liability terminated with respect to these shipments. This is particularly shown by that part of the opinion on pages 300 to 302 of the Record. This holding, finding, and conclusion of the Court of Appeals is not in any way attacked in petitioner's application on file herein except to say that if the writ is granted, additional errors will be asserted. We are rather inclined to the view that if there were any possibility of attacking this part of the opinion of the Court of Appeals, it would have been done in the application. However, in any event, no attack in this application is made upon this portion of the opinion of the Court of Appeals. Further, no valid attack could be made.

We therefore submit that, on this basis, the application should be denied.

II.

The Court of Appeals correctly held that, after the cargo was unloaded into storage, the responsibility for further movement was on the consignee, and the responsibility of the prior carriers for further move-

ment under the original contract for transportation had ceased.

Each of the cars were consigned to "French Supply Council - Transit Division - Notify J. D. Latta, 206 Cotton Exchange Building, Galveston, Texas.", with destination being stated "Galveston, Texas", (R. 7). After arrival in Galveston, Texas, the consignee then ordered the carrier holding the cars to divert them to Texas City, Texas, for unloading, this order reading as follows:

> "We attach a list of KD box car parts that we request you divert immediately to Texas City for unloading." (R. 35)

The additional facts in connection with this unloading are correctly stated in the opinion of the Court of Appeals, and it is respectfully submitted that "the liability of a common carrier ceases with delivery of the goods at the point of destination according to the direction of the shipper or consignee". (SOUTHERN ADVANCE BAG AND PAPER COMPANY VS. TERMINAL RR. ASSOCIATION, 171 SW 2d 107—Mo. Apps., 1944; ARKANSAS RR. CO. VS. WINTERS, 265 SW 967—Ark Sup., 1924; LONDON & NORTHWESTERN RY. CO. VS. BARTLETT, 7 Hurl & Nor. 400, 158 English Reports 529, 23, English Ruling Cases, page 434—1861; and BROOKS VS. PENN. RR. CO., 187 Fed. 2d 869—C.C.A., 2nd—certiorari denied. BROOKS VS. PENN. RR.—Oct. 8, 1951, U. S. Supreme Court, Law Edition Reports, Vol. 96, Advance Sheet No. 1, page 36.)

In addition, the rule is well settled that a delivery into storage, pursuant to directions of consignee, constitutes a final termination of carrier liability. This was held in PILLSBURY FLOUR MILLS CO. V. INTERLAKE S.S. CO., 40 Fed. 2d 439—C.C.A., 2nd,—1930—Certiorari denied, 282 U. S. 845; and in THE RICHARD WINSLOW, 71 Fed. 426—1896;

and in BONDY VS. AMERICAN TRANSFER CO., 115 Pac. 965—Calif. Apps.—1911; and this is particularly true where the carrier is paid only for services rendered up to the unloading, and the remaining services are paid for by the consignee, as in ARMOUR & CO. VS. ALTON R. CO., 111 Fed. 2d 913—C.C.A., 7th—1940, affirmed 312 U. S. 195; and BURTON VS. WABASH RY. CO., 58 SW 2d 443—Mo. Supreme—1933. The above cases are cited in addition to those cited in the opinion of the Court of Appeals and, we believe, control our present case. This is particularly true when it is considered that the bill of lading gave the destination as Galveston, Texas, (R. 7), and the diversion order was to Texas City "for unloading", (R. 35). The only basis for any contention for a shipside delivery is, as above noted, under the provisions of Tariff 1016-I which provide that the rates apply to shipside, (R. 294, 146), and "where such rates apply to shipside" and "under rates applying to shipside" cargo would be placed "on tracks on docks, wharves, or piers", (R. 146); but when the property was ordered into storage on the Texas City Railway Company premises by the consignee, then under the provisions of Item 360 of Tariff 1033-M, the rates were no longer applicable to shipside but, as stated in that tariff, the rates then became "the all-rail rate applicable from point of origin to the place of storage", (R. 295, 151), and thereafter, as shown by this same Item 360, the cost of storage, reloading, switching, or other expense necessary after the first unloading was to be borne by the consignee under arrangements made, and to be made, by the consignee, (R. 295, 151).

Petitioner asserts that shipside rates create an obligation to place at shipside; applying petitioner's own argument, when the rates became rates only **"to the place of storage,"** then delivery into storage only was required.

Under the above, we respectfully submit that, as shown by the opinion of the Court of Appeals, in this case, and the additional authorities also in support thereof, cited above, this application should be

denied. However, we would like to briefly refer to the arguments advanced by petitioner herein, which may be summarized into two thoughts:

1) Petitioner asserts that since the term "transportation", as defined in the Interstate Commerce Commission Act, includes storage (49 USCA 1 (3)), then that the rail common carriers are liable as common carriers under the provisions of the Interstate Commerce Act, even after the goods have been delivered into storage under applicable tariffs and by direction of the consignee.

2) That the opinion of the Court of Appeals in this case conflicts with the opinion of the Second Circuit in LEHIGH VALLEY OIL CO. VS. LYSAGHT, LTD., 271 Fed. 906.

III.

The fact that the Interstate Commerce Commission Act allows the Interstate Commerce Commission to regulate storage and the fact that the word "transportation" was defined in such act as including storage has nothing to do with the questions of termination of carrier liability, of delivery, and of liability on freight claims.

It is true that Section 1 (3) of 49 USCA defines the term "transportation" as including storage. This is with respect to the general regulatory jurisdiction of the Interstate Commerce Commission. It has nothing to do with the question of whether or not a railroad is liable as a common carrier or whether or not delivery has been made into storage. Or putting it another way, the fact that storage may be regulated by the Interstate Commerce Commission under the provisions of Section 1 (3) of the Interstate Commerce Act has nothing to do with the question of liability for freight claims.

If such a contention were correct then, under Section 1 (3) of the Act, during the process of perform-

ing any service referred to under that section, the liability of the carrier would be as a common carrier. This is simply not correct.

This same argument, as now advanced by petitioners, was advanced in EFLAND HOSIERY MILLS VS. HINES, 114 SE 472 (No. Car. Sup.—1922) and in ILLINOIS CENTRAL RR CO. VS. STIMSON, 268 SW 835 (Ky. App.—1925) and in each case denied.

The fallacy of such a contention is further shown by the multitude of cases which hold that, after the expiration of free time, the liability becomes that of warehouseman only, UNITED METALS SELLING CO. VS. PRYOR, 243 Fed. 91 (C.C.A., 8th—1917) —Cert. Denied, 245 U. S. 662; PEAVY VS. PHILADELPHIA B. & W. RR CO., 277 Fed. 333 (Dist. Col. App.—1921). In fact, one of the cases cited in the petition here is MICHIGAN CENTRAL RR CO. VS. MARK OWEN & CO., 256 US 427, which clearly recognizes and holds that upon the expiration of free time carrier liability ends. If petitioner's contention is correct, the MARK OWEN case is wrong for the reason that under the principles announced in the MARK OWEN case, after the expiration of 48 hours free time and while the property is held in storage, no carrier liability exists.

Petitioner further cites SOUTHERN RR CO. VS. PRESCOTT, 240 US 632, and other cases. As all of these cases have been clearly discussed and considered in the opinion of the Court of Appeals, we respectfully call the Court's attention to the discussion of these cases in the opinion of the Court of Appeals. Purely by way of comment, we note that on page 12, in Footnote 7, petitioner criticizes the Court of Appeals for the statement in the opinion of the Court of Appeals with respect to the PRESCOTT case that "it was conceded that the contract of carriage was ended", and petitioner states that actually the quoted words were taken from the South Carolina decision, leaving the inference that this

Court held otherwise, which this Court did not do.

Actually, this Court (240 U.S. 632, at page 635) quoted the following to show the issue before this Court:

> " * * * It, therefore, being conceded in the Circuit Court that the contract of carriage was ended and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute under which it might have arisen is not before this court and the only question argued which we can consider is the question as to warehouseman. * * * "

It is thus clear that the only question before this Court was a question involving a warehouseman's liability and not a carrier liability.

Petitioner further contends that the Prescott Case is controlling here and in conflict with the opinion of the Court of Appeals. However, the Prescott Case involved only the question of the burden of proof of negligence in a warehouseman liability case, i. e., whether the Federal or State rule as to the burden of proof would be applicable. It was conceded in that case that the question of common carrier liability was not before this Court. The Prescott Case did not involve the question of delivery; it did not involve the question of carrier liability; and it did not involve any question in our present case. Therefore, the Court of Appeals' opinion here is not and cannot be in conflict with the Prescott Case. The Court of Appeals here correctly held that carrier liabilitty had ended. This Court of Appeals' holding cannot be in conflict with the Prescott Case holding on the question of burden of proof as to a warehouseman.

The Court of Appeals further correctly held that in the Prescott Case, the question decided was the applicability of Federal Law, as opposed to State Law, in a warehouseman case and that the Prescott

Case did not involve any question of common carrier liability. In the cases decided after the Prescott Case, involving claimed carrier liability for loss or damage to cargo, the same conclusion as to the effect of the Prescott Case has been reached as reached by the Court of Appeals in our present case, and these cases are in accord with the decision of the Court of Appeals here, UNITED METALS SELLING CO. V. PRYOR, 243 Fed. 91 (CCA-8th, 1917) cert. denied; 245 U.S. 662; SOLOMON STERN, LTD. VS. DAVIS, 292 Fed. 221 (D.C.E.D.Pa. 1930); CENTRAL OF GEORGIA RY. CO. VS. YESBIK, 92 S. E. 527 (Ga. Sup. 1917); CENTRAL OF GEORGIA RY. CO. VS. OWENS, 110 S. E. 339 (Ga.App. -1922); ILLINOIS CENTRAL R. CO. V. STIMSON, 268 S. W. 835 (Ky. App.-1925); BRIGGS HARDWARE CO. VS. AROOSTOOK VALLEY R. CO., 104 Atl. 8 (Me.Sup.-1918); CHICAGO R. I. & P. CO. V. LAWTON GRAIN COMPANY, 221 Pac. 1013 (Okla.Sup. 1923); and in other types of situations it has been uniformly held that the Prescott Case involved the question of liaility as a warehouseman; LAKE UNION DRY DOCK & MACHINE WORKS VS. UNITED STATES, 79 Fed. 2d 802 (C.C.A.-9th-1935) and DELAWARE DREDGING CO. VS. GRAHAM, 43 Fed. 2d 852 (D.C.E.D., Pa. 1930).

In fact, all of the cases cited by petitioner under this point may be summarized as only holding that the Federal law is applicable here, but none of them are applicable to, decide, or involve, the questions of when carrier liability terminates, of when delivery is made or any other question of carrier liability involved in our present situation.

We, therefore, respectfully submit that petitioner's position in this respect is untenable.

IV.

The opinion of the Court of Appeals in this case is not in conflict with the opinion of the Court of

Appeals for the Second Circuit in LEHIGH VALLEY OIL CO. VS. LYSAGHT, 271 Fed. 906.

Briefly, we desire to call the Court's attention to the following facts which clearly show that the LYSAGHT case is not in conflict with the opinion of the Court of Appeals in our present case:

A) The Court of Appeals in our present case has held that valid notices of arrival and tenders of delivery were made on or prior to April 4 (12 days before the explosion) and that free time had expired long before the explosion. This holding and finding has not been attacked as grounds for this application for writ of error. In the LYSAGHT case no such notices of arrival or tender had been made, and the questions here presented were not involved in that case.[2]

B) In our present case the Court of Appeals has held under the facts that the responsibility of the carriers here for further movement under the original contract for transportation ceased and ended when the goods were unloaded into storage, (R.

NOTE 2

Petitioner states on page 15 of its petition as to the LYSAGHT Case that "By a provision of the bill of lading which reduced carrier liability following a specified period after notice of arrival 'at destination or at port of export' and by a tariff provision, the liability of the carrier during the holding period had been reduced to that of warehouseman", leaving the implication that the facts in the LYSAGHT case involved proper notices of arrival at destination or port of export, and the expiration of free time similar to our present case. This implication and statement is incorrect in that under the facts of the LYSAGHT case, no question was presented as to notices of arrival at destination or consequent free time resulting therefrom.

303), and liability as a carrier for the interstate transportation under the original contract had come to an end (R. 306). Or, putting it another way, that delivery into storage was a final termination of carrier liability under the original contract and a final delivery. As shown by the Court of Appeals' opinion and the cases cited herein this opinion is correct. Since delivery into storage here constituted a final termination of the carrier liability under the bill of lading and tariffs, the question of the effect of a new order by the consignee to the Terminal Company, after delivery, involving new charges cannot affect the question at all. Or, in other words, since delivery into storage here is a final termination of carrier liability, this case does not involve, and it is immaterial here, as to effect of subsequent contracts between the consignee and the Terminal Company. In the LYSAGHT case, it was assumed, for the basis of decision, that there had been no final termination of carrier liability. To say that the Court of Appeals' opinion here and the LYSAGHT opinion are in conflict is to say, without a consideration of the facts in either case that every decision in which, under the facts of that particular case, it has been held that delivery occurred is in conflict with every other decision which, under the facts of the particular case, has held no delivery. Whether or not a delivery or final termination of liability has occurred is dependent upon the facts of the particular case. None of the facts upon which the Court of Appeals here held that a final termination of carrier liability under the original contract and tariffs had occurred were present in the LYSAGHT case and there is, and can be, no conflict in the two decisions.

C) In the LYSAGHT case, as stated by the Court of Appeals in our present case, the tariff provided that shipments could be held in route at Jersey City, N. Y., "until receipt of written order for disposition from consignee", and that during such time and before the receipt of a written order of disposition,

the carrier should be liable only if negligent; and, as stated by the Court of Appeals here, "The tariff thus fixed the exact time for carrier liability to be reinstated". The substance of this same statement is made by the Court itself in the LYSAGHT case. In that case the Court held, as to reinstatement of carrier liability: "This is expressly stated by A-1 of the Company's tariff". There is no such provision involved in our present case; in fact, the tariff provisions here are entirely different and contrary; and, as a matter of fact, as held by the Court of Appeals in our present case, the property had reached destination and valid notices of arrival had been given, which holding by the Court of Appeals is unchallenged here.

D) The facts in the LYSAGHT case are entirely different in that in the LYSAGHT case, the goods were shipped to New York for export, including lighterage, and were held en route at Jersey City, N. J. As stated in the opinion of the Court of Appeals in our present case, with respect to the LYSAGHT case, "Another important distinction is that there, clearly, the shipment could not be said to have reached its destination", whereas, here in our present case, the shipment had reached its destination.

E) In the LYSAGHT case the interstate transportation had not come to an end and the carrier, upon receipt of order to forward the shipment, was under duty to so forward the shipment. In our present case, consignee diverted the goods to Texas City "for unloading" which unloading exhausted the entire rail rate charged, the storage arrangement at Texas City was between the consignee and the Texas City Terminal Railway Company, and the storage charges and all other charges thereafter were to be paid by the consignee who would also direct when and to where the cargo would be reloaded and switched.

F) In our present case, the only basis for any obligation to deliver shipside is the fact that the rail-

rates apply to shipside under the original tariffs, but these same tariffs also provide that in the event of unloading into storage, the rail rate was exhausted. This situation did not exist in the LYSAGHT case in any manner.

G) In the LYSAGHT case the cargo had to be transported from Jersey City, N. J., to Pier 69 North River, New York, N. Y. In our present case the only switching to be done was the short distance within the Terminal premises; and in the only case in point, this switching has been held to be a mere switching operation only. See SOUTHWEST NATIONAL BANK OF DALLAS VS. MKT. RR. CO. OF TEX., 18 SW 2d 807 (Tex. Civ. App.—1929—Error refused by Texas Supreme Court).

For these many reasons, and further because the LYSAGHT case on its facts is not in any manner in point, we respectfully submit that there is no conflict between the opinion of the Court of Appeals in our present case and the opinion of the Court in the LYSAGHT case.

CONCLUSION.

It is respectfully submitted that there is no conflict in the decision and opinion of the Court of Appeals in this case and the decisions of this Court; that there is also no conflict with the decision of the Court of Appeals in the LYSAGHT case; and that the decision here does not establish an erroneous precedent, but, on the contrary, only reaffirms and is in accord with the well recognized rules of law applicable to our present fact situation.

It is respectfully submitted that the opinion and judgment of the Court of Appeals is correct, both as shown by the opinion of the Court itself and by the additional authorities cited herein.

It is respectfully submitted that the petition for writ of certiorari filed herein should be denied.

Respectfully submitted,

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